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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
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10/717,523

11/21/2003

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016800-586

8425

21839 7590 01/08/2009  
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EXAMINER

ALSTRUM ACEVEDO, JAMES HENRY

ART UNIT

PAPER NUMBER

1616

NOTIFICATION DATE

DELIVERY MODE

01/08/2009

ELECTRONIC

**Please find below and/or attached an Office communication concerning this application or proceeding.**

The time period for reply, if any, is set in the attached communication.

Notice of the Office communication was sent electronically on above-indicated "Notification Date" to the following e-mail address(es):

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<b>Office Action Summary</b>	<b>Application No.</b> 10/717,523	<b>Applicant(s)</b> JOSSO, MARTIN	
	<b>Examiner</b> JAMES H. ALSTRUM ACEVEDO	<b>Art Unit</b> 1616	

**-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --**

### Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) OR THIRTY (30) DAYS, WHICHEVER IS LONGER, FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

### Status

- 1) ☒ Responsive to communication(s) filed on 18 September 2008.
- 2a) ☐ This action is **FINAL**.                      2b) ☒ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

### Disposition of Claims

- 4) ☒ Claim(s) 1, 3-27, 29-30, 32-55, 57-58, and 60-61 is/are pending in the application.
- 4a) Of the above claim(s) \_\_\_\_\_ is/are withdrawn from consideration.
- 5) ☒ Claim(s) 60 is/are allowed.
- 6) ☒ Claim(s) 1, 3-27, 29, 30, 32-55, 57 and 58 is/are rejected.
- 7) ☒ Claim(s) 61 is/are objected to.
- 8) ☐ Claim(s) \_\_\_\_\_ are subject to restriction and/or election requirement.

### Application Papers

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☐ The drawing(s) filed on \_\_\_\_\_ is/are: a) ☐ accepted or b) ☐ objected to by the Examiner.  
Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).  
Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

### Priority under 35 U.S.C. § 119

- 12) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☐ All    b) ☐ Some \*    c) ☐ None of:
1. ☐ Certified copies of the priority documents have been received.
2. ☐ Certified copies of the priority documents have been received in Application No. \_\_\_\_\_.
3. ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).
- \* See the attached detailed Office action for a list of the certified copies not received.

### Attachment(s)

- |  |   |
|--|---|
| 1) <input type="checkbox"/> Notice of References Cited (PTO-892)                     | 4) <input type="checkbox"/> Interview Summary (PTO-413)           |
| 2) <input type="checkbox"/> Notice of Draftsperson's Patent Drawing Review (PTO-948) | Paper No(s)/Mail Date. _____                                      |
| 3) <input type="checkbox"/> Information Disclosure Statement(s) (PTO/SB/08)          | 5) <input type="checkbox"/> Notice of Informal Patent Application |
| Paper No(s)/Mail Date _____  | 6) <input type="checkbox"/> Other: _____                          |

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**DETAILED ACTION**

**Claims 1, 3-27, 29-30, 32-55, 57-58 and 60-61 are pending.** Applicants' previously cancelled claims 2, 28, 31, and 56. Applicants have amended claims 1, 12-13, 21, 25, 30, 41-42, 49, and 53. Applicants indicated the wrong status for claim 12, which is currently amended, not previously presented. Claims 60-61 are new. Receipt and consideration of Applicants' amended claim set are acknowledged. Any rejections or objections of record that have not been explicitly maintained herein are withdrawn per Applicants' claim amendments and/or persuasive arguments.

***Continued Examination Under 37 CFR 1.114***

A request for continued examination under 37 CFR 1.114, including the fee set forth in 37 CFR 1.17(e), was filed in this application after final rejection. Since this application is eligible for continued examination under 37 CFR 1.114, and the fee set forth in 37 CFR 1.17(e) has been timely paid, the finality of the previous Office action has been withdrawn pursuant to 37 CFR 1.114. Applicant's submission filed on September 18, 2008 has been entered.

***Claim Objections***

**Claim 61 is objected** to because of the following informalities: the word "comprises" is misspelled on line 9 as "comrpises". Appropriate correction is required.

***Claim Rejections - 35 USC § 103***

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The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

The factual inquiries set forth in *Graham v. John Deere Co.*, 383 U.S. 1, 148 USPQ 459 (1966), that are applied for establishing a background for determining obviousness under 35 U.S.C. 103(a) are summarized as follows:

1. Determining the scope and contents of the prior art.
2. Ascertaining the differences between the prior art and the claims at issue.
3. Resolving the level of ordinary skill in the pertinent art.
4. Considering objective evidence present in the application indicating obviousness or nonobviousness.

The rejection of claims 1, 3-6, 9-18, 25, 29-30, 32-46, 53, and 58 under 35 U.S.C. 103(a) as being unpatentable over Iijima et al. (U.S. Patent No. 6,258,857) in view of Fankhauser et al. (US 2002/0155073) is **maintained** per the teachings/disclosures set forth on pages 5-6 and 10-11 of the office action mailed on November 30, 2005 and page 4 of the office action mailed on May 12, 2006. The reasons of record have been restated herein below for ease of reference.

### ***Applicant Claims***

Applicant claims (1) a device comprising (a) a reservoir confining at least one composition for protecting skin and/or hair against UV radiation and (b) means to place said composition under pressure, wherein the composition is in the form of a simple or complex emulsion and

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comprises in a cosmetically acceptable aqueous carrier (i) a photoprotective system capable of screening out UV radiation and (ii) spherical microparticles of porous silica.

***Determination of the Scope and Content of the Prior Art (MPEP §2141.01)***

Iijima discloses (1) a composition contained in a releasing container such as **an aerosol container or pump type-releasing container**, and used as being released from such releasing container, and (2) a releasing container product containing such composition (see column 1, lines 7-11), wherein the composition includes one of three types comprising a blending of **inorganic porous fine particles** (e.g. **silicic anhydride, i.e. silica**) and (1) carrying a chemical, disperse solution, acrylic acid polymer, and alkali; (2) carrying a chemical, disperse solution, and synthetic resin fine particles; (3) carrying a chemical, disperse solution, acrylic acid polymer, alkali, and synthetic resin fine particles. The chemical to be carried by the inorganic porous fine particles includes **ultraviolet blocker, antioxidant**, sunburn remedy, moisturizer, styptic, oil, and others. As disperse solution, **water**, alcohol, ether and other organic solvents may be used (abstract). A typical example of releasing means include **the aerosol mechanism and pump spray mechanism** (column 4, lines 59-60). Iijima discloses that one, two, or more of the carried chemicals may be used by blending depending on the intended use (column 5, lines 24-31). Examples of ultraviolet blockers include **benzophenones derivatives, salicylate esters, and p-amino benzoic acid derivatives** (column 7, lines 15-27). Iijima discloses that the inorganic fine particles include metal oxides (**silica, titanium dioxide, iron oxide, zinc oxide**, and others) that are preferably **nearly spherical in shape** and present in the composition in amounts ranging from **0.01 to 60 weight %**. This range encompasses the stated ranges in claims

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9 and 10. Iijima discloses that the specific surface, pore volume, and particle size of the particles ranges from 20 to 800 m<sup>2</sup>/g, 0.01 to 1.50 ml/g, and 0.5-15 microns, respectively (column 10 lines 2-3 and Table 1).

Fankhauser teaches mixtures of micronized organic UV filters for preventing tanning and for lightening human skin and hair and to their use in cosmetic and pharmaceutical formulations (i.e. sunscreen compositions) [0001]. These compositions are desirable for the preservation of skin color after solar irradiation [0003]. Fankhauser teaches suitable UV filters include triazine derivatives, benzotriazole derivatives, cinnamic acid derivatives, camphor derivatives, para-aminobenzoic acid (PABA) and derivatives thereof, salicylates, benzophenones and also other classes of substance known as UV filters [0007] with specific examples including 2,4,6-tris(diisobutyl-4'-aminobenzalmalonate)-s-triazine [0065], 2-ethylhexyl-4-methoxycinnamate [0099], and benzophenones-3 and -4 [0139]. Fankhauser teaches that his invention can be used in the form of various cosmetic formulations, including for treating hair, such as shampoos, hair conditioners, hair care compositions, etc. [0248]. The cosmetic formulations taught by Fankhauser can be in one of various forms, including in the form of liquid preparation such as water in oil (W/O), oil-in-water (OIW), oil-water-oil (O/W/O), water-in-oil in water (WIO/W), PIT, and other microemulsions [0250]. It is also noted that Fankhauser teaches the inclusion of inorganic micropigments, including ZnO and TiO<sub>2</sub> coated with either aluminum oxide or silicon dioxide (i.e. silica) [0259]. Microemulsions are obvious over emulsions.

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***Ascertainment of the Difference Between Scope the Prior Art and the Claims  
(MPEP §2141.012)***

Iijima lacks the teaching of species of UV-screening agents belonging to the group stated in claims 13 and 42, and regimes or regimens for UV-protecting skin and/or hair by spraying on an effective amount of a sunscreen composition. These deficiencies are cured by Fankhauser.

***Finding of Prima Facie Obviousness Rational and Motivation  
(MPEP §2142-2143)***

It would have been obvious to a person of ordinary skill in the art at the time of the instant invention to combine the teaching of Iijima and Fankhauser, because both inventors teach UV-protecting compositions comprising sunscreen agents and Fankhauser's compositions are specifically intended to prevent changes in skin color upon solar irradiation. A person of ordinary skill in the art at the time of the instant invention would have known that the term solar irradiation obviously encompasses ultraviolet (UV) radiation. It would also have been obvious to a skilled artisan to place a sunscreen composition in aerosol/non-aerosol containers, as taught by Iijima, and apply said compositions to a subject's skin and/or hair by spraying. A skilled artisan would have been motivated to use the a dispenser containing a composition resulting from the combined teachings of Iijima and Fankhauser to protect against the damaging effects of UV-radiation on skin and hair, because Fankhauser teaches that his compositions, comprising UV filters, are intended to prevent skin color change resulting from solar irradiation, which includes UV radiation. A skilled artisan would have had a reasonable expectation of successfully using the combined teachings to obtain a sunscreen composition to prevent damage from UV-

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radiation, because both references teach cosmetic compositions comprising known UV filters/screening agents.

### ***Response to Arguments***

Applicant's arguments filed September 18, 2008 have been fully considered but they are not persuasive. Applicants have traversed the instant rejection by arguing that (1) attacking Iijima individually; (2) asserting that the combined teachings are deficient because these allegedly do not teach or suggest a (a) "simpler complex emulsion", (ii) "photoprotective system capable of screening UV radiation" and (iii) "means to place said composition under pressure", and (iv) "wherein the composition exhibits a SPF that is greater than a SPF exhibited by an identical composition that does not comprise spherical microparticles of porous silica"; and (3) Applicant's data provided in declaration form (i.e. secondary considerations) demonstrate unexpected results.

The Examiner respectfully disagrees. In response to applicant's arguments against the references individually, one cannot show nonobviousness by attacking references individually where the rejections are based on combinations of references. See *In re Keller*, 642 F.2d 413, 208 USPQ 871 (CCPA 1981); *In re Merck & Co.*, 800 F.2d 1091, 231 USPQ 375 (Fed. Cir. 1986).

Regarding (2), this argument is unpersuasive, because these phrases have been accorded proper weight. Applicant's arguments to the contrary are Applicant's opinion and merely a point of disagreement, because these phrases have been properly considered. For example, the combined references establish that emulsions are conventional forms for cosmetic compositions,



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such as sunscreens and lotions (Fankhauser). Furthermore, Applicants' claims do not recite a "simpler complex emulsion", but rather a "simple or complex emulsion." The phrase "simple or complex emulsion" encompasses the full range of possibilities for emulsions. Thus, the emulsions known in the prior art (e.g. microemulsions) necessarily are a species of either simple or complex emulsions.

Regarding (3), Applicants have demonstrated an unexpected ~100% increase in SPF in comparison with a reasonable prior art composition by way of data provided in a 1.132 declaration. However, the declaration data is not commensurate in scope with what Applicant is claiming, because the independent claims are generic with regards to the UV screening system, which can comprise more than one UV screening agent and is not limited to benzophenone-3 (See declaration data) or octocrylene (see specification data on pages 14-15 [Example 1]) as the screening agent, and include other structurally divergent organic screening agents (see Applicant's claim 12 for example) as well as inorganic screening agents. Furthermore, it is unclear from Applicant's data whether the results obtained using benzophenone-3 would be representative of the large genus of UV screening agents, which include both organic screening agents as well as inorganic UV screening agents (e.g. ZnO). Applicant's invented formulation used in the side-by-side comparison appears to be a simple emulsion. It is unclear if the same or similar result would be observed for complex emulsions as well. Finally, it is unclear from Applicant's declaration data whether the observed result would be observed upon incorporation of the emulsion into a larger composition as one of many ingredients in a cosmetic formulation.

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The rejection of claims 1, 3-12, 14-25, 29-30, 32-41, and 47-52 under 35 U.S.C. 103(a) as being unpatentable over Iijima et al. (U.S. Patent No. 6,258,857) in view of Torgerson et al. (U.S. Patent No. 6,458,906) **is maintained** per the disclosures/teachings set forth on pages 5-6 and 11-13 of the office action mailed on November 30, 2005 and pages 4-5 of the office action mailed on May 12, 2006.

### *Applicant Claims*

Applicant's claims have been described above.

### *Determination of the Scope and Content of the Prior Art (MPEP §2141.01)*

The teachings of Iijima and Torgerson are of record. The teachings of Torgerson have been restated above in the instant office action. The teachings of Torgerson are restated herein below. Torgerson teaches **cosmetic** and pharmaceutical compositions containing dispersible thermoplastic elastomeric copolymers, for **hair styling** purposes, and for providing cosmetic and pharmaceutical compositions for **topical application to the skin** (abstract). Torgerson teaches that the hair care and topical skin compositions comprising copolymers of his invention can be formulated into a wide variety of product types, including **sunscreens** (column 14, lines 16-23). Torgerson teaches that cosmetically acceptable topical carriers include **hydro-alcoholic systems (i.e. aqueous) and oil-in-water emulsions** (column 16, lines 23-25).

Torgerson teaches that sunscreen agents are also useful in his inventions, including **3-(4-methylbenzylidene) camphor, titanium dioxide, zinc oxide, silica, iron oxide, and mixtures thereof** (column 18, lines 5 and 19-21). Example XIX teaches an **emulsion** for topical skin application that **provides protection from the harmful effects of ultraviolet radiation**.

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Torgerson teaches that his invention may also include sunless tanning agents, including dihydroxyacetone, which can be used in combination with sunscreen agents (column 18, lines 52-56). Example XVII teaches a sunless tanning emulsion for topical skin application.

***Ascertainment of the Difference Between Scope the Prior Art and the Claims  
(MPEP §2141.012)***

Iijima lacks the teaching of sunscreen compositions comprising at least one self-or artificial tanning agent, including dihydroxyacetone (DHA). This deficiency is cured by Torgerson.

***Finding of Prima Facie Obviousness Rational and Motivation  
(MPEP §2142-2143)***

It would have been obvious to a person of ordinary skill in the art at the time of the instant invention to combine the teachings of Iijima and Torgerson, because they both teach sunscreen compositions comprising silica, UV-sunscreens, metal oxides, and aqueous carriers. It would have been apparent to a skilled artisan that combination of the teachings of Iijima and Torgerson would have yielded a composition suitable to protect a person's skin from UV-radiation damage and that would also allow one to obtain the appearance of a tan, due to the presence of a sunless tanning agent (dihydroxyacetone), per Torgerson's teachings. A skilled artisan would have had a reasonable expectation of successfully obtaining a viable sunscreen/self-tanning composition, because the combined art teaches compositions containing well known sunscreen and sunless tanning agents. The amount of self- or artificial tanning agents in a composition is clearly a result effective parameter that a person of ordinary skill in the art

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would routinely optimize. Optimization of parameters is a routine practice that would be obvious for a person of ordinary skill in the art to employ. It would have been customary for an artisan of ordinary skill to determine the optimal amount of each ingredient needed to achieve the desired results. Thus, absent some demonstration of unexpected results from the claimed parameters, the optimization of ingredient amounts would have been obvious at the time of applicant's invention.

### ***Response to Arguments***

Applicant's arguments filed September 18, 2008 have been fully considered but they are not persuasive. Applicants have traversed the instant by reiterating the traversal arguments presented against the 1<sup>st</sup> 103 rejection maintained in this office action. The Examiner's position regarding these arguments is herein incorporated by reference. It is also noted that Torgerson teaches that the formulations may be emulsions. Thus, the combined prior art teachings are fairly suggestive of compositions in the form of emulsions comprising porous spherical silica microparticles capable of screening out UV radiation. Regarding Applicant's data, the rebuttal arguments of this showing of unexpected results are herein incorporated by reference. The instant rejection is deemed to remain proper.

The rejection of claims 26-27, 54-55, and 57 under 35 U.S.C. 103(a) as being unpatentable over Iijima et al. (U.S. Patent No. 6,258,857) ("Iijima") in view of Torgerson et al. (U.S. Patent No. 6,458,906) ("Torgerson") as applied to claims 1, 3-12, 14-25, 29-30, 32-41, and 47-52 above, and further in view of Candau, D. (U.S. Patent No. 6,033,648) ("Candau") **is**

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**maintained** per the teachings set forth on pages 5-6 and 11-14 of the office action mailed on November 30, 2005 and pages 4-5 of the office action mailed on May 12, 2006.

### *Applicant Claims*

Applicant claims a device as described above, wherein said composition further comprises at least one polymer of isophthalic acid or of sulfoisophthalic acid.

### *Determination of the Scope and Content of the Prior Art (MPEP §2141.01)*

The teachings of Iijima and Torgerson are of record and have been restated above in the instant office action. The teachings of Candau are of record are restated herein below.

Candau teaches topically applicable/dermatological compositions for persistent artificial tanning of human skin (abstract). Candau teaches cosmetic compositions additionally comprising at least one aqueous dispersion of film-forming polymer particles to improve the persistence of coloration and water colorfastness on the skin. Examples of these film-forming polymers include polyesters prepared in known manner by polycondensation from monomers, such as, phthalic acid, **isophthalic acid, diethylene glycol, cyclohexanedimethanol, and sulfoisophthalic acid.** Candau teaches that one may also use **copolymers based on isophthalate/sulfoisophthalate** and more particularly copolymers prepared by condensation of **diethylene glycol, cyclohexanedimethanol, isophthalic acid and sulfoisophthalic acid** (column 7, lines 33-36; column 8, lines 63-64; and column 9, lines 5-8, 15-18, and 37-44).

### *Ascertainment of the Difference Between Scope the Prior Art and the Claims (MPEP §2141.012)*

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Iijima lacks the teaching of polyesters and copolymers thereof, including polyesters or copolymers thereof derived from isophthalic acid or sulfoisophthalic acid.

***Finding of Prima Facie Obviousness Rational and Motivation  
(MPEP §2142-2143)***

It would have been obvious to combine the teachings of Iijima in view of Torgerson with the teachings of Candau because both teach cosmetic compositions comprising sunless tanning agents for topical application to the skin. A skilled artisan would have been motivated to combine the teachings of Candau with those of Iijima in view of Torgerson, because the film-forming polymers of Candau's compositions improve the persistence of coloration and water colorfastness on the skin. Therefore, a person of ordinary skill would have had a reasonable expectation of successfully obtaining a cosmetic sunscreen/sunless tanning composition, because the combined art teaches known components used as UV-sunscreens and sunless tanning agents and which improve the persistence of color on the skin.

***Response to Arguments***

Applicant's arguments filed September 18, 2008 have been fully considered but they are not persuasive. Applicants have traversed the instant by reiterating the traversal arguments presented against the 1<sup>st</sup> 103 rejection maintained in this office action. The Examiner's position regarding these arguments is herein incorporated by reference. It is also noted that Torgerson teaches that the formulations may be emulsions. Thus, the combined prior art teachings are fairly suggestive of compositions in the form of emulsions comprising porous spherical silica

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microparticles capable of screening out UV radiation. Regarding Applicant's data, the rebuttal arguments of this showing of unexpected results are herein incorporated by reference. The instant rejection is deemed to remain proper.

### ***Double Patenting***

The nonstatutory double patenting rejection is based on a judicially created doctrine grounded in public policy (a policy reflected in the statute) so as to prevent the unjustified or improper timewise extension of the “right to exclude” granted by a patent and to prevent possible harassment by multiple assignees. A nonstatutory obviousness-type double patenting rejection is appropriate where the conflicting claims are not identical, but at least one examined application claim is not patentably distinct from the reference claim(s) because the examined application claim is either anticipated by, or would have been obvious over, the reference claim(s). See, e.g., *In re Berg*, 140 F.3d 1428, 46 USPQ2d 1226 (Fed. Cir. 1998); *In re Goodman*, 11 F.3d 1046, 29 USPQ2d 2010 (Fed. Cir. 1993); *In re Longi*, 759 F.2d 887, 225 USPQ 645 (Fed. Cir. 1985); *In re Van Ornum*, 686 F.2d 937, 214 USPQ 761 (CCPA 1982); *In re Vogel*, 422 F.2d 438, 164 USPQ 619 (CCPA 1970); and *In re Thorington*, 418 F.2d 528, 163 USPQ 644 (CCPA 1969).

A timely filed terminal disclaimer in compliance with 37 CFR 1.321(c) or 1.321(d) may be used to overcome an actual or provisional rejection based on a nonstatutory double patenting ground provided the conflicting application or patent either is shown to be commonly owned with this application, or claims an invention made as a result of activities undertaken within the scope of a joint research agreement.

Effective January 1, 1994, a registered attorney or agent of record may sign a terminal disclaimer. A terminal disclaimer signed by the assignee must fully comply with 37 CFR 3.73(b).

**Claims 1, 11-14, 30, and 40-43 are provisionally rejected on the ground of nonstatutory obviousness-type double patenting as being unpatentable over claims 1, 11-21, and 26 of copending Application No. 11/653,868 (copending ‘868) in view of Iijima et al. (U.S. Patent No. 6,258,857) (“Iijima”) and Fankhauser et al. (US 2002/0155073).** Independent claim 1 of copending ‘868 claims a topically applicable fluid anti-sun/sunscreen composition comprising (a) at least one photoprotective system for screening UV radiation and

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(b) at least one tertiary-amide terminated polyamide. Dependent claims 11-14 of copending '890 define the photoprotective system to include one or more hydrophilic or lipophilic organic compounds or pigments (claim 11) selected from a specific group of organic screening agents (claims 13-14). The organic screening agents recited in claims 13-14 of copending '868 represent species of the classes of organic screening agents recited in Applicants' claims 12 and 41, for example. Dependent claim 26 of copending '868 claims a pressurization device comprising (i) at least one reservoir containing the composition of claim 29 in vaporizable form and (ii) a means for placing said composition under pressure.

The primary differences between the claims of copending '868 and the instant application are that (i) the claims of copending '868 lack the recitation of spherical porous silica microparticles, (ii) do not specify that the composition is an emulsion, and (iii) the claims of the instant application do not require an ester-terminated polyamide polymer. Deficiency (iii) does not render the instant rejection improper, because the claims of the instant application utilize comprising language and do not exclude the presence of additional components. Deficiencies (i)-(ii) are cured by the teachings of Iijima and Fankhauser set forth above. The formulation of the compositions in the form of an emulsion as being an obvious variant of the claims of copending '868 is further supported by the specification of copending '868, which demonstrates that the compositions were contemplated to be formulated as simple or complex emulsions (see paragraph [0105]). This position is supported by the courts. *See In re Vogel*, 422 F.2d 438, 164 USPQ 619 (CCPA 1970); *See also* MPEP §804 (indicating that the specification can be used as a dictionary and that those portions of the specification that provide support for claims may be used to determine what constitutes an obvious variant). Therefore, it would have been prima



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facie obvious to modify the claimed composition of copending '868 per the teachings of the prior art and utilize porous spherical silica microparticles as carriers for UV screening agents and to prepare formulations in conventional forms for topical administration, such as simple or complex emulsions.

This is a provisional obviousness-type double patenting rejection.

**Claims 1, 11-14, 30, and 40-42 are provisionally rejected on the ground of nonstatutory obviousness-type double patenting as being unpatentable over claims 14, 16-17, and 30 of copending Application No. 12/216,890 (copending '890) in view of Iijima et al. (U.S. Patent No. 6,258,857) ("Iijima") and Fankhauser et al. (US 2002/0155073).** Independent claim 1 of copending '890 claims a fluid anti-sun/sunscreen composition comprising (a) at least one photoprotective system for screening UV radiation and (b) at least one tertiary-amide terminated polyamide. Dependent claims 14 and 16-17 of copending '890, further define the photoprotective system to include one or more hydrophilic or lipophilic organic compounds or pigments (claim 14), selected from a specific group of organic screening agents (claims 16-17). The organic screening agents recited in claims 16-17 of copending '890 represent species of the classes of organic screening agents recited in Applicants' claims 12 and 41, for example. Dependent claim 30 of copending '890 claims a pressurization device comprising (i) at least one reservoir containing the composition of claim 29 in vaporizable form and (ii) a means for placing said composition under pressure.

The primary differences between the claims of copending '890 and the instant application are that the claims of copending '890 lack the recitation of spherical porous silica microparticles

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and do not specify that the composition is an emulsion. These deficiencies are cured by the teachings of Iijima and Fankhauser set forth above. The formulation of the compositions in the form of an emulsion as being an obvious variant of the claims of copending '868 is further supported by the specification of copending '868, which demonstrates that the compositions were contemplated to be formulated as simple or complex emulsions (see paragraph [0087]-[0093]). This position is supported by the courts. *See In re Vogel*, 422 F.2d 438, 164 USPQ 619 (CCPA 1970); *See also* MPEP §804 (indicating that the specification can be used as a dictionary and that those portions of the specification that provide support for claims may be used to determine what constitutes an obvious variant).

This is a provisional obviousness-type double patenting rejection.

#### ***Allowable Subject Matter***

Claim 60 is allowed. Applicant has provided declaration data demonstrating unexpected results for an emulsified composition (simple or complex emulsion) contained in a device, wherein said composition comprises porous spherical silica microparticles and benzophenone-3, and exhibits a higher SPF than a comparable composition lacking the recited porous spherical silica microparticles. See Dr. Martin Josso's declaration submitted on December 6, 2007.

#### ***Conclusion***

**Claims 1, 3-27, 29-30, 32-55, and 57-58 are rejected. Claim 61 is objected. Claim 60 is allowed.**

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Any inquiry concerning this communication or earlier communications from the examiner should be directed to James H. Alstrum-Acevedo whose telephone number is (571) 272-5548. The examiner can normally be reached on M-F, 9:00-6:30, with every other Friday off.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Johann Richter can be reached on (571) 272-0646. The fax phone number for the organization where this application or proceeding is assigned is 571-273-8300.

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